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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE WILFREDO ARIAS MELGAR,

Defendant and Appellant.

F063206

(Super. Ct. No. MCR033616A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Madera County. Mitchell C. Rigby, Judge.

Eduardo Paredes, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Cornell, Acting P.J., Poochigian, J., and Franson, J.

In April 2010, appellant, Rene Wilfredo Arias Melgar, pursuant to a plea agreement, pled no contest to possession of methamphetamine for purposes of sale, in violation of Health and Safety Code section 11378 (section 11378). In June 2010, the court placed appellant on five years' probation. More than one year later, on August 3, 2011, appellant filed a notice of motion to vacate his conviction pursuant to Penal Code section 1016.5 (section 1016.5)<sup>1</sup> on the grounds the court in April 2010 did not adequately inform him of the immigration consequences of his plea. At a hearing on August 24, 2011, the court denied the motion. The instant appeal followed. Appellant requested that the court issue a certificate of probable cause. The court granted that request.

Appellant's sole contention on appeal is that the court erred in denying his motion to vacate the judgment. We affirm.

### **PROCEDURAL BACKGROUND**

On April 5, 2010, appellant executed a "DECLARATION REGARDING GUILTY PLEA" in which he averred, "My attorney has explained ... [that] my plea may have the consequence of my deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States."

Later that day, appellant appeared in court with counsel. Early in the proceeding, appellant and defense counsel affirmed that appellant had entered into a plea agreement under which appellant would plead no contest to the section 11378 violation and would receive a grant of probation. A short time later, the court advised appellant, *inter alia*, "If you should not be a United States citizen, as a result of your plea you could be

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<sup>1</sup> We generally refer to subdivisions of section 1016.5 in abbreviated form, e.g., sections 1016.5(a), 1016.5(b), and 1016.5(d).

deported, denied naturalization or excluded from the country.” Shortly thereafter, appellant entered his plea.

## **DISCUSSION**

Appellant argues that the trial court erred in failing to vacate the judgment of conviction under section 1016.5 because the court that took his plea in 2010 failed to adequately advise him of the immigration consequences of his plea. Specifically, he contends the court erred in failing to advise him that under federal law, a plea to violating section 11378 made his “removal from the United States” not just a possibility, but a certainty. There is no merit to this contention.

Section 1016.5(a) provides that prior to acceptance of a plea to any offense more serious than an infraction, the court “shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged *may have* the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” (§ 1016.5(a), italics added.) “The exact language of the warning given by the court is not crucial.” (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1475.) “[S]ubstantial compliance [with the statutory advisement] is all that is required, ‘as long as the defendant is specifically advised of all three separate immigration consequences of his plea.’ [Citation.]” (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244.)

Section 1016.5(b) provides, as relevant here: “If ... the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty

or nolo contendere, and enter a plea of not guilty.” We review denial of such a motion under an abuse of discretion standard. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 (*Zamudio*).)

The court that accepted appellant’s plea did not err by not advising him that exclusion from the country was a mandatory consequence of his conviction.<sup>2</sup> Section 1016.5(d) provides, in relevant part: “it is the intent of the Legislature in enacting this section [that] ... acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for ... a defendant [who is not a citizen of the United States] which *may* result from the plea. (Italics added.) Thus, the Legislature intended that trial courts advise defendants of the “*potential* adverse immigration consequences.” (*Zamudio, supra*, 23 Cal.4th at p. 209, italics added.) The court, using language substantively identical to that set forth in section 1016.5(a), advised appellant about the three possible immigration consequences. Nothing more is required. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174, fn. 4.)

Appellant bases his claim that the court had an obligation under section 1016.5 to advise him that his plea would result in mandatory exclusion from the United States on *Padilla v. Kentucky* (2010) 559 U.S. \_\_ [130 S.Ct. 1473, 176 L.Ed.2d 284] (*Padilla*). In that case, Padilla, a native of Honduras, was charged with transporting marijuana in Kentucky. In considering whether to plead guilty to the charge, Padilla relied on his attorney’s advice that “he ““did not have to worry about immigration status since he had been in the country so long.””” (*Id.* at pp. 1477-1478.) Contrary to the advice given by his attorney, the United States government subsequently sought to deport Padilla. (*Id.* at p. 1477.) The Kentucky Supreme Court assumed the truth of Padilla’s allegation that he

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<sup>2</sup> We assume without deciding that, as appellant contends, his plea made his exclusion mandatory as a matter of federal law.

would not have pled guilty absent his attorney's erroneous advice, and held a criminal defendant's Sixth Amendment right to the effective assistance of counsel is not implicated by the attorney's incorrect advice about collateral consequences of a guilty plea, such as the immigration consequences of such a plea. (*Padilla, supra*, at p. 1478.)

The United States Supreme Court, however, held "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." (*Padilla, supra*, 130 S.Ct. at p. 1482.) In the portion of the opinion upon which appellant relies, the high court stated: "When the law is not succinct and straightforward ..., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, ... the duty to give correct advice is equally clear." (*Id.* at p. 1483, fn. omitted.)

The duty to which the *Padilla* court refers, however, is that of trial counsel under the Sixth Amendment to the United States Constitution. *Padilla* does not address the court's duty to advise of immigration consequences of a plea under section 1016.5 or on any other basis. Therefore, *Padilla* does not, in appellant's formulation, "contemplate an expansion" of the matters on which a court must advise a defendant under section 1016.5(a). (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [cases are not authority for propositions not considered therein].) Appellant asks that this court, in effect, rewrite the statute. We will not do so. The trial court did not abuse its discretion in denying appellant's motion to vacate the judgment pursuant to section 1016.5(b).

### **DISPOSITION**

The judgment is affirmed.